There are many qualifications and conditions that must be satisfied before a "people" may secede which, as stressed, is a last resort, especially if there arises an institutional failure on the part of the United Nations. If this thesis holds, then our argument in the last analysis is a marked demonstration of an international regime that is more respectful of a public order of human dignity in its most abstract sense. Hence, the overriding value is human dignity in its most abstract sense. Hence, the overriding value is human dignity and respect, both in the individual and in the collective plane. The 2006 June HRC proceedings clarified the positions of many member-states, and, evidently, many explanations during the vote show that there is a marked divergence of opinion on the right to self-determination. Unexpectedly, even countries such as China argued for nothing less than an unqualified consensus and lamented over the fact that a vote had to be conducted at all and at so early a stage, that is, before the submission of the draft Declaration to the General Assembly. What was also worrisome is that quite a few countries abstained on the sole and feeble reason that a consensus had not been formed before the roll call. This is no reason for abstention, and worse, nor is it a substantive one. But the hope remains that any future work should be conducted in a constructive spirit of cooperation, especially considering that the issue at hand involves the fate of almost 400 million individuals in the world. They are the living morsels of these once great civilizations the ruins of which have been eroded by the mad current of the mainstream.

Is the Head of State Above International Law? The Applicability of Head of State Immunity to the Commission of International Core Crimes

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I. INTRODUCTION

Immunity for Heads of State, otherwise known as Head of State immunity, has existed in the international arena since the 18th Century and has been an evolving concept ever since.[1] Historically, the Head of State was conferred absolute immunity as a matter of respect or recognition for the sovereignty of the State which he or she represents.[2] In 1961, the Vienna Convention on Diplomatic Relations provided for a separation between functional immunity and personal immunity,[3] altering the existing perspectives of absolute immunity afforded to a Head of State. Later, the advent of *jus cogens* norms or peremptory norms of fundamental character from which no derogation is allowed, again changed the perspectives on Head of State immunity[4] by paving the way in the international community to question

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1. JOSEPH SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY i (1963); PETER MALANCZUK, AKEHURT'S MODERN INTRODUCTION TO INTERNATIONAL LAW 118 (7d ed. 1997); Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, 54 MOD. L. REV. 664, 668-78 (1991); Michael Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 653 (2002); Adam Hasson, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet and Milosovic — Trends in Political Accountability and Transnational Criminal Law*, 25 BOSTON COLLEGE INT'L & COMP. L. REV. 125, 125 (2002); Lee Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L. L. 741, 743 (2003).
2. MALANCZUK, *supra* note 1, at 188-89; Tunks, *supra* note 1, at 655.
3. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 29 and 31, 500 U.N.T.S. 95 [hereinafter Vienna Convention on Diplomatic Relations].
4. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (5d ed. 1999); Sir Hersch Lauterpacht, II *Law of Treaties*, 27 BY 397-8, 2 Y.B. INT'L L. COMM. 154-55 (1953); Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, HAGUE RECUEIL 120, 122 and 125 (1957, II).

whether the historical immunities grated to Heads of State still exist in situations of derogation from these fundamental norms.

The International Court of Justice (ICJ) attempted to answer this query in the *Arrest Warrant* case between the Democratic Republic of Congo and Belgium.[5] For the first time in history, it handed down a decision concerning the availability of Head of State immunity for the commission of core crimes and violations of *jus cogens* norms. This decision ultimately led to significant ramifications to the complex concept of Head of State immunity in international law.

On 11 April 2000, an investigating judge of the Brussels *tribunal de première instance* issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, who, at that time, was current Minister for Foreign Affairs of the Democratic Republic of Congo. The arrest warrant accused him of having made various speeches inciting racial hatred during the month of August 1998.[6] Furthermore, the warrant charged him as the perpetrator of offenses constituting grave breaches of the 1949 Geneva Conventions and its Additional Protocols, as well as for the commission of crimes against humanity.[7]

Congo challenged this act before the ICJ by maintaining that a Minister for Foreign Affairs of a sovereign State is entitled to absolute inviolability and immunity from criminal processes during his or her term in office. Accordingly, Congo maintained that during his or her tenure, a Minister for Foreign Affairs may never be subjected to any criminal prosecution in a foreign court, and that any finding of criminal responsibility or any investigation thereto would contravene the principle of immunity from jurisdiction. Congo further contended that the immunity accorded to Foreign Ministers covered all acts, including any act committed before assumption into office.[8]

Belgium, on the other hand, argued that while Ministers for Foreign Affairs in office generally enjoy immunity from jurisdiction before foreign courts under customary international law, such immunity only applied to acts carried out in the course of their official functions, and did not protect such persons in respect to private acts or when they acted beyond the scope of their authority.[9]

5. Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002).
6. *Id.* at 8, ¶ 14.
7. *Id.* at 8, ¶ 13.
8. *Id.* at 18, ¶ 47.
9. *Id.* at ¶ 49-50.

In determining the law applicable to immunity afforded to incumbent Ministers for Foreign Affairs, the Court declared that the Vienna Convention on Diplomatic Relations[10] and the New York Convention on Special Missions[11] only provided some guidance on certain aspects of the question on immunity, and that the rule of Yerodia's immunity must be determined by customary international law. As such, the Court stated:

> ([t]he Vienna Convention on Diplomatic Relations and the New York Convention on Special Missions) do not, however, contain any provision specifically defining the immunities enjoyed by Ministers of Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to immunities of such Ministers ...[12]

In finding that Belgium's arrest warrant violated international customary law, the Court equated Yerodia, an incumbent Minister for Foreign Affairs, with a Head of State. The Court stated:

> [i]n customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States .... In the performance of these functions, he or she is frequently required to travel internationally, and thus, they must be in a position to freely do so when the need should arise. The Court further observes that a Minister for Foreign Affairs, *responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like a Head of State or the Head of Government*, he or she is recognized under international law as a representative of the State solely by virtue of his or her office.
>
> The Court accordingly concludes that the functions of a Minister of Foreign Affairs are such that, throughout the duration of his or her office, he or she, when abroad, enjoys *full immunity from criminal jurisdiction and inviolability*. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.[13]

What is rather curious, however, is how the Court arrived at the conclusion that Yerodia was entitled to absolute immunity when all it cited

10. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

11. UN GA Res. 23/2530 (XXIV), Dec. 8, 1969, UN Doc. A/RES/2530 (XXIV), Annex (a), Convention on Special Missions, 1400 U.N.T.S. 231 [hereinafter Convention on Special Missions].

12. Arrest Warrant of 11 April 2000, General List No. 121 (2002), at 19, ¶ 52 (emphasis supplied).

13. *Id.* at 19, ¶ 53-54 (emphasis supplied).

was *Pinochet* and *Qhaddafi* which were obviously cases involving former Heads of State.[14]

Despite their analogy between Ministers for Foreign Affairs and Heads of State in finding that Yerodia was entitled to immunity, the Court failed to distinguish which form of immunity was applicable to him. It would seem that in certain instances, the Court found that Yerodia's functional immunity was violated by providing that the arrest warrant would hamper the effective performance of his functions:

> In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official capacity,' and those claimed to have been performed in a 'private capacity,' or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office ... . *The consequences of such impediment to the exercise of those functions are equally serious*, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an 'official' visit or a 'private' visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs to acts performed while in office, regardless of whether the arrest relates to alleged acts performed in an 'official capacity' or a 'private capacity.' Furthermore, *even the mere risk that, by traveling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from traveling internationally when required to do so for the purposes of the performance of his or her official functions.*[15]

Since the Court indicated that there was no distinction between Yerodia's acts performed in his official capacity and his personal capacity, it would seem that the Court claimed the applicability of immunity *ratione personae* (personal immunity) to the Minister for Foreign Affairs, although it reasoned that its grant of immunity rested on the effective performance of his functions.[16]

The Court then, without substantiating its findings through State practice or *opinio juris* as it had done in many instances in the past[17] and

14. Micaela Frulli, *The ICJ Judgment on the Belgium v. Congo Case (Feb. 14, 2002): A Cautious Stand on Immunity from Prosecution for International Crimes*, 3 GERM. L. J., ¶ 4, Mar. 1, 2002, http://www.germanlawjournal.com/article.php?id=138 (last accessed Mar. 4, 2007) [hereinafter Frulli, *Belgium v. Congo*].

15. Arrest Warrant of 11 April 2000, General List No. 121 (2002), at 20, ¶ 55 (emphasis supplied).

16. Steffen Writh, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EURO. J. INT'L. L. 877, 879 (2002); Antonio Cassese, *When May Senior Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EURO. J. INT'L L. 853, 855 (2002).

17. Frulli, *Congo v. Belgium*, *supra* note 14, at ¶ 3.

without determining the *jus cogens* nature of the crimes implicated against Yerodia, concluded that it failed to find any form of State practice pointing to any exception to the immunities afforded to Ministers for Foreign Affairs for violations of international crimes. In support of this contention, the Court declared:

> The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. *It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs where they are suspected of having committed war crimes or crimes against humanity.*[18]

The Court also found that none of the decisions of the ad hoc tribunals of Nuremburg and Tokyo or the International Criminal Tribunal of the Former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR) dealt with immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of war crimes or crimes against humanity.[19] Thus, previous decisions were not at variance with the current case.

To counter Belgium's claim that the determination of immunity would confer Yerodia impunity for his acts, the Court differentiated the procedural aspect of immunity from its substantive aspect. Verily, the Court provided:

> The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility.[20]

This, it would seem, conforms to the opinion of some authors that there is a material distinction between the procedural nature of immunity and the substantive character of criminal responsibility.[21]

18. Arrest Warrant of 11 April 2000, General List No. 121 (2002), at 21, ¶ 58 (emphasis supplied).

19. *Id.* at 21, ¶ 58.

20. *Id.* at 22, ¶ 60 (emphasis supplied).

21. Kerstin Bartsch & Björn Elberling, Jus Cogens *vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogero-poulou et al. v. Greece and Germany Decision*, 4 GERM. L. J. 477, 484 (2003).

To bolster the argument of the inapplicability of impunity due to the severance of procedural and substantive law, the Court provided four circumstances where prosecution of a Minister for Foreign Affairs will not present a bar to criminal prosecution:

> First, such persons enjoy no criminal immunity under international law in their own countries and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.
>
> Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.
>
> Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that p riod of office in a private capacity.
>
> Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[22]

It must be noted that the Court expressly recognized the binding character of article 27 (2) of the Rome Statute of the International Criminal Court (ICC) providing that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising jurisdiction over such person."[23]

On 14 February 2002, the ICJ rendered its decision with an overwhelming majority vote of thirteen votes to three:

> [T]here is no actual conflict of rules between the *jus cogens* norms allegedly violated and the reliance of states on state immunity before the courts .... Thus, if a *jus cogens* rule prohibits certain conduct, *e.g.* war crimes, this same rule does not bar states from relying on state immunity before national courts in cases concerning war crimes, since state immunity only concerns enforcement, not the material conduct of *jus cogens* rule.

See, id., Andres Zimmerman, *Sovereign Immunity and Violations of International Jus Cogens — Some Critical Remarks*, 16 MICH. L. J. 433, 438 (1995) ("It seems to be more appropriate to consider both issues as involving two different sets of rules [immunity and *jus cogens* violations] which do not interact with one another.").

22. Arrest Warrant of 11 April 2000, General List No. 121 (2002), at 22, ¶ 61.

23. Rome Statute of the International Criminal Court, July 17, 1998, art. 27, 2178 U.N.T.S. 3 [hereinafter Rome Statute of the ICC].

> That the issue against Mr. Abdykaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister of Foreign Affairs of the Democratic Republic of Congo enjoyed under international law.[24]

The *Arrest Warrant* case constitutes the first definitive discussion of the immunities granted to incumbent Heads of State. This case, however, presents fundamental flaws in the reasoning of the Court as well as serious erroneous notions on the nature of Head of State immunity.

This Note is divided into eleven parts. Part I serves as an introduction through a narration of the factual background of the landmark *Arrest Warrant* case. Part II provides for the foundational basis of the core crimes as violations of *jus cogens* norms. Part III demonstrates the historical development and status of State immunity and Head of State immunity prior to the *Arrest Warrant* case as well as the relationship of these two concepts. Part IV will show how the ICJ misapplied the norms of Head of State immunity to Ministers for Foreign Affairs. Part V will then demonstrate the normative hierarchical approach to international norms and debunk this by showing that Head of State immunity is neither a fundamental right nor a customary norm. Part VI lays down the customary rule of culpability for violations of core crimes. Part VII will provide for an alternative approach to culpability. Part VIII then assumes that Head of State Immunity is a customary rule, which nonetheless, admits of several exceptions; it further demonstrates that the conferment of immunity will result in impunity. Part IX will recognize that under specific circumstances, immunity for Heads of State may be granted for the most serious criminal atrocities. Part X will then provide for recommendations for future application of Head of State immunity. And finally, this Note draws its conclusion in Part XI.

II. THE PROHIBITION AGAINST CORE CRIMES: *JUS COGENS* NORMS ALLOWING NO DEROGATION

Before engaging in any form of discussion on the norms applicable in international law regarding Head of State immunity, it is necessary to first establish what rules under international law are applicable to core crimes. It is this author's opinion that the prohibition on the commission of core crimes fall under *jus cogens* norms from which no derogation is allowed.

A. Definition of Jus Cogens Norms

24. Arrest Warrant of 11 April 2000, General List No. 121 (2002), at 29, ¶ 78 (2).

Jurists have, from time to time, attempted to classify rules or rights in the international plane by using terms such as fundamental or inherent. Although previously, these attempts have been executed with much futility, current times mark the accepted view that certain overriding principles of international law exist, forming the body of *jus cogens*.[25] This form of fundamental obligation is recognized in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) providing that *jus cogens* is:

> a *peremptory norm of general international law* is a norm accepted and recognized by the international community of States as a whole as a norm *from which no derogation is permitted* and which can be modified only by a subsequent norm of general international law having the same character.[26]

Verily, the concept of *jus cogens* prescribes the bare minimum of non-derogable State conduct. So important are these rules and principles that any unilateral action or international agreement which violates them is absolutely prohibited,[27] implying then that *jus cogens* may even curtail various privileges.[28] This stems from the concept that law cannot tolerate acts which run counter to its very foundation.[29]

B. Positive Evidence Characterizing the Prohibition as a Jus Cogens Norm

Although granting that there has been much dispute in determining which norms may be classified into the list of *jus cogens* norms,[30] sufficient legal basis exists to conclude that crimes against humanity, genocide and torture are violations of *jus cogens* norms.[31]

25. BROWNLIE, *supra* note 4, at 515; Lauterpacht, *Law of Treaties*, *supra* note 4, at 154-55; Fitzmaurice, *General Principles*, *supra* note 4, at 122, 125; *cf.* North Sea Continental Shelf Case (Germ. v. Den.; Germ. v. Neth.) 1969 ICJ REP. 3, Separate Opinion Padilla Nervo, at 97-98, Dissenting Opinion Tanaka, at 18, Dissenting Opinion Sorensen, at 248.

26. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 115 U.N.T.S. 331 [hereinafter VCLT] (emphasis supplied).

27. L. Hannikainen, *Peremptory Norms (Jus Cogens)* in INTERNATIONAL LAW (1988); Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EURO. J. INT'L L. 237, 271(1999).

28. GEORGE SCHWARZENBERGER, INTERNATIONAL LAW (3d ed. 1957); BROWNLIE, *supra* note 4, at 516.

29. Bianchi, *supra* note 27, at 271.

30. *Id.*; BROWNLIE, *supra* note 4, at 515.

31. *See*, BROWNLIE, *supra* note 4, at 515; Theodore Meron, *On the Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986); M. Cherif Bassouni, *International Crimes: Jus Cogens and Obigatio Erga Omnes*, 25 LAW & CONTEMP. PROB. 63, 68 (1996); Frulli, *Belgium v. Congo*, *supra* note 14, at ¶ 5; Bartsch & Elberling, *supra* note 21, at 484.

Core crimes, are the highest form of crimes punishable under international law. Unlike all other forms of international crimes, acts such as genocide, crimes against humanity and war crimes remain distinguishable due to their universally heinous and repugnant character. These crimes are of such abhorrent character that no known civilized system allows their commission. Verily, the rather *sui generis* nature of these core crimes have long been recognized by statutes of various international criminal tribunals and provide that such tribunals have jurisdiction over the same,[32] thereby placing them in a different category from municipal crimes.

Recent case law has affirmed that the prohibition to commit war crimes, crimes against humanity and genocide have a non-derogable peremptory character, thus elevating them to *jus cogens* norms.[33] In fact, the ICTY in *Prosecutor v. Kupreskic* stated:

> Most norms of international humanitarian law, in particular, those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, *i.e.* of a non-derogable and overriding character.[34]

In addition, Lord Browne-Wilkinson in the *Pinochet* case provided:

> ([t]he prohibition on torture) has evolved into a peremptory norm of *jus cogens* that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules.[35]

32. *See*, Rome Statute of the ICC, arts. 5-8; Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704, annex, arts. 2-5, reprinted in 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, arts. 2-4, UN Doc. S/INF/50 (1994), reprinted in 33 I.L.M. 1602 (1994) [hereinafter ICTR Statute]; Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court of Sierra Leone, Jan. 16. 2002, Annex: Statute of the Special Court of Sierra Leone, arts. 2-4, http://www.sc-sl.org/scsl-statute.html (last accessed Mar. 4, 2007) [hereinafter SCSL Statute].

33. Prosecutor v. Delalic, [ICTY Appeals Chamber] Case No. IT-96-21, Judgment, Feb. 20, 2001, at ¶ 172; Prosecutor v. Krstic, [ICTY Trial Chamber] Case No. IT-98-33, Judgment, Aug. 2, 2001, at ¶ 541; *In re Bouterse, Gerechtshof* Amsterdam, Nov. 20, 2000, *Nederlandese Jurisprudentie* (2001) No. 51, 302, at 303, *translation in* http://www.icj.org/objectives/decision.htm (last accessed Feb. 9, 2007).

34. Prosecutor v. Kupreskic, [ICTY Appeals Chamber] Case No. IT-95-16-A, Oct. 23, 2001.

35. Regina v. Bartle and the Commissioner of Police for the Metropolis and Others *Ex Parte* Pinochet, Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others *Ex Parte* Pinochet (House of Lords: On Appeal from a Divisional Court of the Queen's Bench Division), Mar. 24, 1999, 38 ILM 581 [hereinafter Pinochet III].

This claim is further validated by section 702 of the Third Restatement of the United States which includes genocide, slavery, murder or causing disappearance of individuals, torture, inhuman and degrading treatment, prolonged arbitrary detention and systematic racial discrimination as gross violations of *jus cogens* norms.[36]

In addition, although scholarly disputes and political opposition prevented the codification of State crimes as engaging State responsibility in the International Law Commission's (ILC) Draft Articles on State Responsibility in 1996,[37] this does not deny the widespread acceptance by most of the world's communities that violations of international crimes must be treated differently from other forms of wrongful acts.

Having established the *jus cogens* character of the prohibition to commit international core crimes, a discussion on the historical development of State immunity and Head of State immunity is necessary to show how these foundations of international law were disregarded by the rulings of the ICJ in the *Arrest Warrant* case.

III. STATE IMMUNITY AND HEAD OF STATE IMMUNITY: A DEVELOPMENT OF PARALLEL PARADIGMS

A. State Immunity

The doctrine of foreign State immunity consistently evolved over the last few centuries, progressing through several distinct periods.[38] The first period, covering the 18th and 19th Century, can be considered as a period of absolute immunity of States from domestic legal proceedings absent their express consent.[39] This rule reflected the fundamental premise that all States

36. Restatement (Third) of the Foreign Realtions Law of the United States, 1987, § 702.

37. *See*, Second Report of the International Law Commission's Special Rapporteur James Crawford, Report of the International Law Commission on the work of its Forty-eighth Session, May 6, 1996, GAOR, Fifty-first Sess., U.N. Doc A/51/10 chp.III (deleting Article 19 of the Draft Articles on State on State Responsibility for the commission of international crimes).

38. *See*, GAMAL BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 9 (1984); THEODORE GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION 26 (1970); Hasson, *supra* note 1, at 125; Caplan, *supra* note 1, at 743.

39. *See*, SWEENEY, *supra* note 1, at i; MALANCZUK, *supra* note 1, at 118; Marasinghe, *supra* note 1. at 668-78; Tunks, *supra* note 1, at 653; Hasson, *supra* note 1, at 125; Caplan, *supra* note 1, at 743.

are independent and equal under international law, resulting in the notion that subjecting a State to a foreign court's jurisdiction would be inconsistent with the concept of sovereign equality.[40] In the second period, covering the 20th Century to the present, a concept of restrictive immunity emerged due to the active participation of State governments in international trade.[41] During this era, a distinction was fashioned between public and private acts, where the State was entitled to immunity for the former but not the latter. This period also witnessed the development of concepts such as *acta jure imperii* ([s]tate conduct of a public or governmental nature) and *acta jure gestionis* ([s]tate conduct of a commercial or private nature).[42] The distinction rested on the growing notion that the exercise of jurisdiction over *acta jure gestionis* did not impair a State's sovereign dignity.[43] Progressively, however, due to the very thin line distinguishing these acts, States, particularly common law countries, moved towards developing a functional variation of the restrictive approach by replacing such hazy distinction with national immunity legislation.[44]

B. Head of State Immunity

Immunity for Heads of State has been recognized throughout history as an essential tool in conducting, even influencing, foreign affairs.[45] In fact, Head of State immunity allows a nation's leader to engage in his or her official duties, including travel to foreign countries, without fear of arrest, detention or any other treatment inconsistent with his or her role as the Head of a sovereign State.[46]

40. MALANCZUK, *supra* note 1, at 119; Tunks, *supra* note 1, at 653.

41. *See*, Peter Toobolf, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 266-67 (1986); Tunks, *supra* note 1, at 653; Hasson, *supra* note 1, at 125; Caplan, *supra* note 1, at 743.

42. *See*, SWEENEY, *supra* note 1, at ii; Hasson, *supra* note 1, at 125; Caplan, *supra* note 1, at 743.

43. Hasson, *supra* note 1, at 125; Caplan, *supra* note 1, at 743.

44. Caplan, *supra* note 1, at 743 ([f]or instance, Britain promulgated the U.K. State Immunity Act of 1978 (17 I.L.M. 1123, (1978)). The European Council also made use of the restrictive theory through the promulgation of the Convention of State Immunity (Jun. 11, 1976, E.T.S. No. 074) and Additional Protocol (E.T.S. No. 074A). The United States also soon followed suit by promulgating the Foreign Sovereign Immunities Act of 1976 (Oct. 21, 1976, 90 Stat. 289, Public Law 94-583, 94th Congress (FSIA)).

45. Joshua Groff, *A Proposal for Diplomatic Accountbility Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right*, 14 TEMP. INT'L & COMP. L.J. 213 (2000).

46. Amber Fitzgerald, *The Pinochet Case: Head-of-State Immunity Within the United States*, 22 WHITTIER L. REV. 1002 (2001).

Historically, Heads of State, like States, were absolutely immune from acts committed either in their public or private capacity, and thus, many States found no practical need to distinguish between Head of State immunity and State immunity.[47] However, as principles evolved towards a restrictive immunity for States, it became questionable whether Head of State immunity would follow the same course, or whether international law would allow a greater degree of personal inviolability for State leaders[48] considering that a deficit of legal standards in determining the extent of acts subject to inviolability for Heads of State existed.[49] As the law shifted towards more accountability of individuals for violations of fundamental norms, particularly in the area of human rights,[50] it became apparent that it was best to whittle away at the absolute immunity shield historically enjoyed by Heads of State.[51] This was consistent with the American view that Head of State immunity is a privilege to a foreign sovereign State for the purpose of promoting international respect, diplomacy and comity, and not a power held by the individual leader.[52]

1. Immunity *ratione materiae* — Functional Immunity

The first form of immunity is called immunity *ratione materiae* or functional immunity,[53] which is granted to all State officials for the purpose of not hampering, or interfering with the effective performance of State activities.[54] This affects the competence of local courts to adjudicate in relation to a particular subject-matter[55] — the acts of the official performed in official

47. MALANCZUK, *supra* note 1, at 118-19; Tunks, *supra* note 1, at 655.

48. Tunks, *supra* note 1, at 655.

49. Jerrold Mallroy, *Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 179 (1986).

50. Hari Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L. J. 191, 205 (1997).

51. Joseph Dellapena, *International Decisions, Lafontant v. Aristade*, 884 F: Supp. 128 (E.D.N.Y 1994), 88 AM. J. INT'L L. 528, 531-32 (1994).

52. *See*, *In Re* Grand Jury Proceedings, Doe, 817 F.2d 1108 (4th Cir. 1978), at 1110-11 ("[h]ead of State immunity is founded on the need for comity among nations and respect for sovereignty of other nations .... Head of State immunity is primarily an attribute of State sovereignty and not an individual right.").

53. BROWNLIE, *supra* note 4, at 333; Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 EURO. J. INT'L L. 598 (2001); Writh, *Immunity for Core Crimes*, *supra* note 16, at 882.

54. Zappala, *supra* note 53, at 598.

55. BROWNLIE, *supra* note 4, at 333.

capacity. Hence, immunity *ratione materiae* shields every incumbent or former State official, but only with regard to his or her official conduct.[56]

Although immunity *ratione materiae* is intended for the efficient performance of official acts, this does not necessarily mean that this form of immunity is absolute. It is generally agreed that an exception to functional immunity exists in cases where the individual is responsible for crimes under international customary law.[57] This stems from the reasoning that international crimes are private acts in character and cannot be considered as official acts, thus removing them from the ambit of functional immunity.[58] Evidence of the irrelevance of official functions is found in numerous cases decided in national and international tribunals.[59]

2. Immunity *ratione personae* — Personal Immunity

Immunity *ratione personae* (personal immunity), on the other hand, differs from immunity *ratione materiae* (functional immunity) where the former does not attach as a function of efficient performance.[60] Rather, immunity *ratione personae* attaches to a particular office and is possessed only as long as the official is in office[61] and, unlike functional immunity, also includes immunity for private acts not arising from official capacity.[62] These immunities are limited to a small group of senior officials (*i.e.* the Head of State, Head of Government and Foreign Ministers),[63] to diplomats and other heads of

56. Zappala, *supra* note 53, at 598.

57. Bianchi, *supra* note 27, at 262-66; Zappala, *supra* note 53, at 601.

58. Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L. L. 414 (2004).

59. *See*, Filartiga v. Peña-Irala, 630 F.2d 876 (2nd Circ. 1980); Pinochet III, *supra* note 35, Lord Millet, at 651; Prosecutor v. Blaskic, [ICTY Appeals Chamber], Case No. IT-95-14-A, Judgment on the Request of the Republic of Croatia for Review on the Decision of the Trial Chamber II of 18 July 1997, Oct. 29, 1997, at ¶ 41.

60. For a clearer distinction between immunity ratione materiae and immunity *ratione personae*, see, Cassese, *When May Senior Officials be Tried for International Crimes*, *supra* note 16.

61. Akande, *supra* note 58, at 409.

62. HAZEL FOX, THE LAW OF STATE IMMUNITY 441 (2002). *See also*, Vienna Convention on Diplomatic Relations, arts. 29 and 31; UN GA Res. 23/2530 (XXIV), Dec. 8 1969, UN Doc. A/RES/2530 (XXIV), Annex (a), Convention on Special Missions, 1400 U.N.T.S. 231.

63. Arthur Watts, *The Legal Posistion in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 13 (1994. III).

special missions.[64] More particularly, these immunities are conferred to officials whose primary responsibility is the conduct of international relations with other States, and stems from the recognition that smooth conduct of international relations and cooperation requires an effective process of communication between States.[65] In addition, as high State officials have to exercise their functions without threat, impediment or interference in order to ensure smooth and peaceful conduct of international relations, personal immunity is essentially based on the notion of functional necessity.[66]

3. Rationale for Head of State Immunity

There are two practical reasons for Head of State immunity: first, reciprocity and comity; and second, the particular position of the Head of State as a permanent representative of the State.[67] Due to the second postulate, the extent of personal immunity of a Head of State is not limited to the territorial jurisdiction of the receiving State, such as for diplomatic personal immunity. In other words, the broader immunity from jurisdiction afforded to Heads of State is taken from the premise that Heads of State permanently represent their State. Thus, Head of State immunity allows a nation's leader to engage in his or her official duties, including travel to a foreign country without fear of arrest, detention, or other treatment inconsistent with his or her role as a representative of a sovereign State.[68]

IV. DIVERGENT RULES ON HEADS OF STATE AND MINISTERS FOR FOREIGN AFFAIRS

The findings of the ICJ in *Arrest Warrant* are wrought with serious errors in its reasoning. The ICJ provides that custom dictates an entitlement to immunity for both Heads of State and Ministers for Foreign Affairs.[69] However, there is no State practice with regard to immunities granted to

64. Vienna Convention on Diplomatic Relations, arts. 29 and 31; UN GA Res. 23/2530 (XXIV), Dec. 8, 1969, Annex (a), Convention on Special Missions, UN Doc. A/RES/2530 (XXIV), 1400 U.N.T.S. 231.

65. Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations*, *in* INTERNATIONAL LAW 389 (Malcom D. Evans ed., 2003).

66. J.L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L. L. 837 (1947); Micaela Frulli, *The Question of Charles Taylor's Immunity*, 2 J. INT'L. CRIM. JUST. 1118, 1126 (2004) [hereinafter Frulli, *Taylor's Immunity*].

67. Zappala, *supra* note 53, at 599.

68. Fitzgerald, *supra* note 46, at 1002; Tunks, *supra* note 1, at 656.

69. Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), at 19, ¶ 54 (emphasis supplied).

incumbent Ministers for Foreign Affairs.[70] In providing State practice for the immunity of Foreign Ministers, the ICJ draws its conclusion on an analogy between Ministers for Foreign Affairs and Heads of State:

> [A] Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like a Head of State or the Head of Government, he or she is recognized under international law as a representative of the State solely by virtue of his or her office.[71]

This statement demands particular attention. First, the functions of Ministers and Heads of State, although seemingly similar in character, differ in one essential aspect — the Head of State represents the State not only in certain functions of diplomacy, but is also historically considered to represent the sovereignty of the State.[72] Second, as held by Sir Arthur Watts, "analogy is not always a reliable basis on which to build rules of law."[73] This analogy sets a dangerous precedent, as by the proclamation of the Court, it would seem that its pronouncements also govern Heads of States.

V. THE NORMATIVE HIERARCHICAL APPROACH: THE HIERARCHY OF NORMS BETWEEN JUS COGENS AND IMMUNITY

By elevating the entitlement to Head of State immunity as a custom,[74] the ICJ in the *Arrest Warrant* case establishes Head of State immunity as a norm under international law, subject to a general hierarchy of conflicting norms thus resulting in what is commonly known as the Normative Hierarchical Approach. This approach postulates that core crimes constitute violations of *jus cogens* and peremptory norms which have a superior status than customary norms affording Head of State immunity, and thus, the former ought to prevail over the latter.[75] On this note, the prohibition against the

70. *Id.* Dissenting Opinion Van Der Wyngaert, at 6, ¶ 13.

71. *Id.* at 19, ¶ 53 (emphasis supplied).

72. Zappala, *supra* note 53, at 599.

73. Watts, *supra* note 63, at 40.

74. Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), at 19, ¶ 52.

75. *See*, Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403, 421-23 (1995); Bianchi, *supra* note 27, at 265; Michael Beyers, *Comment on Al-Adsani v. Kuwait*, 1996 BRIT. Y. B. INT'L L. 537, 539-40; Alexander Orakhelashvili, *State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights*, 15 LEIDEN J. INT'L L. 703, 712-13 (2002) [hereinafter Orakhelashvili, *State Immunity in National and International Law*]; Alexander Orakhelashvili, *Case Report: Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 96 AM. J. INT'L L. (2002) [hereinafter Orakhelashvili, *Arrest Warrant*]; Alexander Orakhelashvili, *State Immunity and International Public Order*, 2002 GERM. Y.B. INT'L L. 227, 255 [hereinafter Orakhelashvili, *State Immunity and International Public Order*]; Caplan, *supra* note 1, at 743; Akande, *supra* note 58, at 414.

commission of core crimes, being *jus cogens* norms, must be considered to trump over less important norms such as the supposed customary norm of Head of State immunity.

Explaining how the Head of State loses his or her immunity is a crucial element of the normative hierarchical approach. From an analysis of the literature on the subject, two methods are recognized. The first rationale is that the State is said to waive its right to immunity by implication when its Head of State commits an act in violation of *jus cogens*.[76] The second rationale arises from the premise that conduct of a Head of State which violates *jus cogens* falls outside the category of protected State conduct, such conduct being devoid of legitimacy because it contravenes the will of the community of nations.[77]

The centerpiece of the normative hierarchical approach hinges on the postulate that the entitlement to Head of State immunity arises from a fundamental right of the State or customary international law. This provides the basis for placing a hierarchy between norms in international law. It is submitted, however, that this fundamental premise is lacking in current international practice since Head of State immunity is not derived from custom, nor may it be considered as an absolute right. Rather, Head of State immunity operates as an exception to the principle of adjudicatory jurisdiction of the forum State.[78] In fact, the normative hierarchical approach fails to recognize that it is the forum State, and not the foreign State, which has the ultimate authority, by operation of its domestic legal system, to modify the privileges of immunity to a foreign State.[79]

76. *See*, Princz v. Federal Republic of Germany, 26 F. 3d. 1166 (D.C. Cir. 1994); Adam Belsky, Mark Merva & Naomi Roht-Arriaza, Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms in International Law*, 77 CAL. L. REV. 365, 394-401 (1989); Working Group of the American Bar Association, *Report, Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L. L. 489, 546 (2002); Caplan, *supra* note 1, at 774.

77. *See*, Prefecture of Voiotia v. Federal Republic of Germany, Case No. 137/1997, *translated in* Maria Cavounelli, *War Reparation Claims and State Immunity*, 50 REVUE HELLENIQUE DE DROIT INTERNATIONAL 600 (1997); Belsky, Merva & Roht-Arriaza, *supra* note 76, at 377; Caplan, *supra* note 1, at 774.

78. *See*, Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). *See also*, Caplan, *supra* note 1, at 743.

79. *See*, Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), Dissenting Opinion Van Der Wyngaert, at 5, ¶ 11 (that the immunity

A. The Erroneous Notion on Head of State Immunity's Customary Character

Belgium, in their counter-memorial to Congo in the *Arrest Warrant* case, conceded that Heads of State are generally entitled to immunity arising from customary international law.[80] This proposition, however, was, at the very least, premature and erroneous.

1. State Practice Applying to Head of State Immunity — a Void in International Law

Although concededly, there have been certain cases involving prosecutions of Heads of State for the violations of *jus cogens* norms before municipal courts such as *Pinochet*,[81] *Marcos*,[82] *Noriega*,[83] *Mugabe*,[84] *Al-adsani*,[85] *Zemin*,[86] *Sharon*,[87] and *Castro*,[88] none of these cases deal with criminal prosecution of incumbent Heads of States for the commission of core crimes. Although the cases of *Mugabe*, *Al-adsani*, *Sharon* and *Zemin* all involved proceedings against incumbent Heads of States for the commission of crimes violating *jus cogens* norms, they only involve civil proceedings and not criminal proceedings. In fact, both the *Mugabe* and *Al-adsani* cases expressly recognized that different standards for Head of State immunity applied before civil and criminal proceedings.[89] Moreover, the findings of the Belgian Court in *Sharon* arose from the faulty premise of the ICJ on *Arrest Warrant* that Head of State immunity is founded on custom.

granted did not fall squarely under customary international law or any international legal instrument.).

80. Counter Memorial of the Kingdom of Belgium in the Arrest Warrant Case, at ¶ 3.5.1., http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04_cobe_20020214.htm (last accessed Mar. 4, 2007) [hereinafter Counter Memorial of the Kingdom of Belgium].

81. Pinochet III, *supra* note 35.

82. *In re* Estate of Ferdinand Marcos, 25 F.3d 1469 (1994).

83. U.S. v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).

84. Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) (No. 00-6666).

85. Al-Adsani v. The United Kingdom, Case No. 35763/97 [2001] E.C.H.R. 752.

86. Plaintiffs A, B, C, D, E, F v. Zemin, No. Civ. 02-75030, 2003 WL 22118924 (N.D. Ill., Sep. 12, 2003).

87. Hijazi et. al. v. Sharon, Belgian Court of Cassation, Case No. P.02.1139.F/1, Feb. 12, 2003.

88. Order (*auto*) of 4 March 1999 (no. 1999/2723).

89. Tachiona v. Mugabe, 169 F. Supp.2d 259 (S.D.N.Y. 2001) (No. 00-6666), at 281; Al-Adsani v. The United Kingdom, Case No. 35763/97 [2001] E.C.H.R. 752, at ¶ 61.

Finally, although the *Castro* case[90] concerned a criminal case for the commission of core crimes, the Head of State's immunity was based on treaty law and not customary international law.[91] This would indicate, therefore, that there is actually no State practice of criminal prosecution of incumbent Heads of State or any form of application for immunity.

Due to the lack of incidents involving criminal prosecution against incumbent Heads of State, it seems that the ICJ in *Arrest Warrant* hinged their claims on the absence of State practice on the prosecution of such individuals. This void in State practice, however, cannot, in and itself, be considered as constituting *opinio juris*.[92] What is clear, however, is that Heads of State cannot use their status as public officials as a shield from avoiding responsibility for their actions. As Sir Arthur Watts observed:

> [a]s with Heads of State, so too it is now accepted that Heads of Governments and Foreign Ministers bear the personal responsibility in international law for those international acts which are so serious as to constitute international crimes. This acceptance has sprung primarily from the judgment of the International Military Tribunal at Nuremburg, and the principle of the international responsibility of individuals has now been incorporated into numerous international instruments.[93]

The lack of legal grounding for its assertions would therefore evince that the ICJ placed greater weight on political considerations rather than on the presence of sufficient legal basis. This is not surprising considering the precarious character of Head of State immunity as well as the rather influential position of the ICJ in the world community. Therefore, just as the historical rationale for establishing immunities is centered on comity, the current practice of granting absolute immunity for sitting Heads of State is commanded by the traditional norms of State-to-State diplomacy.[94]

2. Head of State Immunity — The Exception Rather Than the Rule to Comity

Judge Van Der Wyngaert, in his dissenting opinion in the *Arrest Warrant* case pointed out:

90. Audencia Nacional Order (*auto*) of 4 March 1999 (no. 1999/2723).

91. *See, infra*, Part IX (A).

92. Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), Dissenting Opinion Van Der Wyngaert, at 7 ¶ 13.

93. Watts, *supra* note 63, at 111.

94. Heidi Altman, *The Future of Head of State Immunity: The Case against Ariel Sharon* 9 (Apr. 22, 2002), *available at* http://www.interdictsharon.net/heidialtman-apro2.pdf (last accessed Mar. 4, 2007).

> It is not sufficient to compare the *rationale* for the protection from suit in case of diplomats, Heads of State and Foreign Ministers to draw the conclusion that there exists a rule in customary international law protecting Foreign Ministers: identifying a common *raison d'etre* for a protective rule is one thing, elevating the protective rule to the status of customary international law is quite another thing.[95]

It can be taken from Judge Van Der Wyngaert's thoughts that, although there is a common purpose for the protection of immunities to Foreign Ministers and Heads of States, this simple rationale for the grant of immunity is insufficient to immediately conclude that such doctrine has already crystallized into custom.

The customary character of Head of State immunity is all the more obviated by the fact that the ILC has never been able to codify norms pertaining to immunity *ratione personae* of Heads of State.[96] It is likewise of note that although concededly Heads of State and Foreign Ministers are defined as "internationally protected persons" in article 1 of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons,[97] this Convention only involves situations where Heads of State are victims of certain crimes such as murder, kidnapping and other acts against their person or liberty,[98] and does not encompass the procedural protection of such individuals from foreign jurisdiction.[99]

It must then be noted that the purpose of immunity is to safeguard the ability of States to discharge their functions without foreign interference and to preserve their integrity as States.[100] In reality, a Head of State may be accorded special treatment by foreign States, but it is more likely that such treatment is conferred out of courtesy and respect for the position of the visitor rather than as a reflection of any belief that such treatment is required

95. A rest Warrant of 11 April 2000, General List No. 121 (2002). Dissenting Opinion Van Der Wyngaert, at 5, ¶ 11.

96. *See*, Report of the International Law Commission on the Work of its Forty-third Session to the General Assembly, 1991, U.N. Doc. A/46/10, Annex: Draft Articles on Jurisdictional Immunities of States and their property, art. 3 (2), *reprinted in* 1991 YBILC (II, 2).

97. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, art. 1, 78 U.N.T.S. 277.

98. *Id.* art. 2.

99. *Arrest Warrant of 11 April 2000*, General List No. 121 (2002), Dissenting Opinion Van Der Wyngaert, at 10, ¶ 19.

100. BROWNLIE, *supra* note 4, at 329; Writh, *Immunity for Core Crimes*, *supra* note 16, at 882.

by international law.[101] In essence, the conferment of immunity is not based on any demandable obligation in international law, but is based on qualifications of respect, recognition and comity.

B. The Inexistent Conflict between Head of State Immunity and the Jus Cogens Prohibition against the Commission of Core Crimes

The normative hierarchical approach presupposes that a clash exists between the norms of Head of State immunity and the prohibition against the commission of core crimes. This is a flawed conceptualization, as in reality, no clash exists between these norms,[102] the establishment of Head of State immunity as mere comity-based privileges, as well as the inexistent clash between Head of State immunity and the *jus cogens* norm prohibiting the commission of core crimes, equate to its fundamental failures. Thus, the normative hierarchical approach cannot be applied to Head of State immunity. Nonetheless, the developing standards of international custom mandate culpability for the commission of core crimes. Verily, this norm opens the avenue for eradication of privileges associated with Head of State immunity.

VI. THE EMERGING RULE ARISING FROM CUSTOM: ALL STATE OFFICIALS MUST ANSWER FOR THEIR INTERNATIONAL CRIMINAL ACTS

In order to establish custom, however, a conformance to the elements of its definition, as a constant and uniform usage accepted as law, is necessary.[103] As found in the *North Sea Continental Shelf* Case, two conditions must be satisfied to create custom: 1) the act concerned must amount to settled State practice; and 2) there must be *opinio juris sive necessitatis*, or a belief that this practice is obligatory under the rule requiring it.[104]

101. Watts, *supra* note 63, at 109; *see*, Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), Dissenting Opinion Van Der Wyngaert, at 10, ¶ 20.

102. *See*, Zimmerman, *supra* note 21, at 438; Markus Rau, *European & International Law After Pinochet: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations — The Decision of the European Court of Human Rights in the Al-Adsani Case*, 3 GERMAN L.J. No. 6, ¶ 14 (June 1, 2002), *available at* http://www.germanlawjournal.com/article.php?id=160 (last accessed Mar. 4, 2007); Caplan, *supra* note 1, at 771.

103. ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 25 (1971); D.J. HARRIS, CASES AND MATERIALS IN INTERNATIONAL LAW 27 (4d ed. 1991).

104. *See*, North Sea Continental Shelf Case (Germ. v. Den. Germ. v. Neth.) 1969 ICJ REP 3, at ¶ 77 (where the Court held: Not only must the act concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by

A. Opinio Juris: A Belief on the Obligatory Character of "Irrelevance of Official Status"

In order to constitute custom, it is necessary to prove that States perceive a norm to be obligatory. Through the advent of *jus cogens* norms, this *opinio juris* on the obligatory character of the irrelevance of official status, when it comes to the prosecution for the commission of core crimes, is replete in numerous multilateral treaty provisions which have provided that the official position of individuals will not operate as a bar for prosecution.[105] Moreover, it was recognized both in the Preamble of the Rome Statute[106] and in the Princeton Principles that certain crimes, such as core crimes, are too heinous to go unpunished.[107]

These conventional texts are the clearest evidence of the removal of immunity granted to former or incumbent Heads of State in cases of grave breaches of *jus cogens* norms.[108]

B. Universal and Consistent State Practice Recognizing the Customary Character of the Irrelevance of Official Status Provision

According to the *North Sea Continental Shelf* cases, norms found in treaties may constitute State practice and become an essential basis for the formulation of customary international law.[109] This norm-creating character

the existence of the rule requiring it. The need for such a belief, *i.e.*, the existence of the subjective element, is implicit in the very notion of *opinio juris sive necessitatis*.).

105. *See*, Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, art. 227, 1 BEVANS 43; Charter of the International Military Tribunal in Nuremburg, Aug. 8, 1945, art. 7. 8 U.N.T.S. 279 [hereinafter Nuremburg Charter]; Charter for the International Military Tribunal for the Far East, Jan. 9 and Apr. 26, 1946, art. 6, TIAS No. 1589, 4 Bevans 20 [hereinafter Tokyo Charter]; Genocide Convention, art. 4; ICTY Statute, art. 7 (2); ICTR Statute, art. 6 (2); SCSL Statute, art. 6 (2); Rome Statute of the ICC, art. 27.

106. Rome Statute of the ICC, Preamble.

107. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 17 (Stephen Macedo ed., 2001), *available at* http://www.princeton.edu/~lapa/unive_jur.pdf (last accessed Mar. 4, 2007) [hereinafter Princeton Principles]. *See*, Paul Toner, *Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense*, 108 PENN. ST. L. REV. 899, 907 (2004).

108. Altman, *supra* note 94, at 4.

109. *See*, D'AMATO, *supra* note 103, at 25; MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES (1985); HARRIS, *supra* note 103, at 40; R.R. Baxter, *Treaties and Customs*, 129 HAGUE RECUEIL DES COURS 25, 27 (1970, I); Jonathan Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L.R. 971 (1986). *See generally*, Arthur Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L. L. 1 (1988); Luigi Condorelli, *Custom*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 79-211 (Mohammad Bejaoui ed., 1991).

of treaty law, coupled with the widespread acceptance of the irrelevance of official status provisions of the Nuremburg Charter, Tokyo Charter, ICTR Statute, ICTY Statute, SCSL Statute, and Rome Statute only solidify such provision's customary character. Finally, numerous UN Resolutions,[110] reports[111] and opinions of organizations such as the International Law Association,[112] and the *Institut de droit*[113] have recognized that the official capacity of an individual cannot be used as a shield for criminal responsibility. This same view was shared by the Cairo Principles[114] and the Princeton Principles.[115] Even, advocacy organizations such as Amnesty International have taken the position of accountability for international

110. *See*, Sub-Commission on Human Rights, Res. 2000/24, *Role of Universal or Extraterritorial Compentencein Preventive Action Against Impunity*, Aug. 18, 2000, UN Doc E/CN.4/RES/2000/68; Commission on Human Rights Res. 2000/70, *Impunity*, Apr. 25, 2001, UN Doc. E/CN.4/RES/2000/70.

111. See, M. Joinet, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Revised Final Report to Sub-Commission Decision 1996/119. Oct. 2, 1997, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1; Commission on Human Rights, *Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final Report of the Special Rapporteur, Mr. M. Cherif Bassouni, submitted in accordance with Commission Res. 1999/33, UN Doc. E/CN.4/2000/62.

112. International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, 2000, *available at* http://www.ila-hq.org (last accessed Mar. 4, 2007).

113. *Institut de droit international, Resolution of Santiago de Compostela*, Sep. 13, 1989; Guiseppe Sperduti, *Protection of Human rights and the principle of non-intervention in the domestic concerns of States. Rapport provisiore*, 63 YBILC 309 (1989, III).

114. Africa Legal Aid, *Preliminary Draft of the Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective, Cairo*, July 31, 2001, *available at* http://www.afla.unimaas.nl/en/act/univjurisd/preliminaryprinciples.htm (last accessed Mar. 4, 2007).

115. Princeton Principles, *supra* note 107; M. Cherif Bassouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VIRG. J. INT'L L. 1, 1 (2001).

crimes.[116] These are views of civil society, which must be taken into account in determining custom.[117]

It is clear then that international customary law indisputably establishes the necessity for criminal responsibility in case of violations of core crimes.[118]

VII. RESOLVING THE CLASH BETWEEN CUSTOM AND COMITY

A. The Immunity Rationale — Fostering Peaceful Relations between States

As previously established, custom mandates criminal responsibility for the commission of core crimes regardless of the actor's official status. Also, the application of Head of State immunity is not compelled by the principle of sovereign equality and corollary, it is neither compelled by any fundamental right in international law. Rather, Head of State immunity is derived from the forum State's waiver of adjudicatory jurisdiction through considerations of courtesy, respect and comity for the foreign sovereign, with the aim of promoting mutually beneficial inter-State relations.

The non-conferment of immunity, however, would not result in grave or irreparable injury to the relationships of States in case of the commission of core crimes by the Head of State. As held by the ICJ in the *Congo v. France* case,[119] "no risk of irreparable prejudice" may arise from the initiation of a criminal investigation against the Head of State of another country.[120] This would indicate that not only is the commission of core crimes detrimental to the relationship of States, but also, the non-conferment of immunity to the Head of State for the commission of criminal atrocities would not cause substantial damage to the State which he or she represents.

Thus, where State conduct is detrimental to inter-State relations and contrary to customary international law, such as in the grant of domestic immunity for the commission of core crimes, the strictures of international law must be amended.

116. Amnesty International. *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, Sep. 2001, AI Index IOR 53/2001.

117. M. Cherif Bassouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VIRG. J. INT'L L. 1, 92 (2001).

118. L. Weerts & A. Weyembergh, *Correspondents' Reports: A Guide to State Practice in the Field of International Humanitarian Law*, 2 Y.B. INT'L . HUM. L. 337 (1999).

119. Certain Criminal Proceedings in France (Congo v. Fr.), Order of 17 June 2003, General List No. 129, *available at* http://www.icj-cij.org/icjwww/idocket/icof/icoforder/ icof_iorder_20030617.pdf (last accessed Mar. 4, 2007).

120. *Id.* at ¶ 35 (which involved an application for provisional remedies by Congo against France's initiation of criminal proceedings against President Denis Sassou Nguesso of Congo before French courts for the commission of crimes against humanity and torture).

B. Satisfying the Collective Interest by Forging a Balance of Interest

From the premise that immunity is not a fundamental right in international law, but rather a concept stemming from comity for the purpose of enhancing relations between States, it is a logical inference that the claim of absolute immunity for the commission of core crimes by Heads of State is mythical, at the very least. Moreover, the extent of immunity granted to the Head of State relies solely on the discretion of the forum State whether or not it intends to inhibit its exercise of jurisdiction over the foreign sovereign.

By a grant of absolute immunity to incumbent Heads of State, an imbalance between the normative status of the customary norm demanding criminal responsibility for core crimes and comity-based immunity is created.[121] Although there is a high degree of significance bestowed upon the sanctity of immunity for incumbent Heads of State, the trend in the international community has been to reject impunity for the most repugnant offenses in international law.[122] A balance must then be set between this dichotomy in the international arena.[123] In the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, they stated:

> On one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. *A balance must therefore be struck between two sets of functions which are both valued by the international community*. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the land on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited.[124]

121. Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), Dissenting Opinion Van Der Wyngaert, at 15, ¶ 28.

122. *Id.* Joint Separate Opinion Higgins, Kooijmans, Buergenthal, at 18, ¶ 75 (emphasis supplied).

123. Paola Gaeta, *The Irrelevance of Official Capacities and Immunities*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 975-1002 (2002); J. Kleffner, *The Impact of Complementarity on National Implementation of Substantive Criminal Law*, 1 J. INT'L. CRIM. JUST. 105-06 (2003); Frulli, *Taylor's Immunity*, *supra* note 66, at 1128.

124. Arrest Warrant of 11 April 2000, General List No. 121 (2002), Joint Separate Opinion Higgins, Kooijmans, Buergenthal, at 18, ¶ 75 (emphasis supplied).

From this approach, the basic test to determine the proper balance in defining immune and non-immune acts would be whether such conduct would substantially harm the vital interests of the State.[125] Moreover, in sustaining this balance, it must be noted that immunity is never substantive and cannot be used to exculpate the offender when committing crimes of the gravest character.[126] As already pointed out in the previous chapters, immunity *ratione materiae* cannot be used as a shield by the offender since the same cannot be considered as an act in official capacity. However, to claim that immunity *ratione personae* is absolute would result in absurdity by international law standards and would be nothing short of injustice. As found by the ICTY in the *Tadic* case, "[it] would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be successfully raised against human rights."[127]

It may be argued that by removing the application of Head of State immunity *ratione personae*, there would be an imbalance towards the responsibility for acts violating *jus cogens* norms, causing an unending litigation against the foreign Head of State.[128] However, this contention fails to recognize the inherent structural fixture preventing the same. Heads of State will not be prosecuted domestically for simple violations or international wrongful acts, but only for violations of the most serious character — core crimes.[129]

To resolve the imbalance between the customary rule on criminal culpability for the commission of core crimes and the respect attributable to a sovereign State calling for Head of State immunity, it would be sufficient to conclude that generally, a Head of State is granted immunity both civil and criminal processes through comity. When it comes to the commission of core crimes, this matter becomes somewhat more complicated, necessitating a distinction between the application of immunity in civil suits and criminal prosecution. A grant of immunity may be allowable for the former through considerations of comity and respect for the sovereign which the Head of State represents, but such grant can never extend to the latter. Allowing civil proceedings to be instituted against Heads of State may open the floodgates to numerous, unfounded and unnecessary litigation primarily due to lack of State intervention in the initiation of proceedings and a lower burden of

125. Caplan, *supra* note 1, at 777.

126. Arrest Warrant of 11 April 2000, General List No. 121 (2002), Joint Separate Opinion Higgins, Kooijmans, Buergenthal, at 18, ¶ 74.

127. Prosecutor v. Tadic, [ICTY Appeals Chamber], Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, (Oct. 2, 1995), 105 ILR 453, 483.

128. Altman, *supra* note 94, at 9.

129. Watts, *supra* note 63, at 84.

proof to establish liability. This dilemma, however, would not arise in prosecuting Heads of State for the commission of core crimes. Thus, through a balance of interest consistent with the customary norms requiring culpability for international crimes and considering the permissible limits of immunity grounded on comity, Heads of State cannot be immune from criminal prosecution for committing core crimes.

VIII. EXCEPTIONS TO THE HEAD OF STATE IMMUNITY NORM

On the assumption, however, that the regime of Head of State immunity arises out of a customary norm, the ICJ's contention in the *Arrest Warrant* case that no exception to immunity exists, is a misnomer.

A. Misguided Application of the Exceptions to Head of State Immunity

In determining that there is no form of exception to the Head of State immunity claimed by Yerodia, the ICJ applied this single paragraph as support for such a bold pronouncement:

> [t[he Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. *It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs where they are suspected of having committed war crimes or crimes against humanity.*[130]

It is rather curious how the ICJ reached this conclusion without even including any of their alleged State practice to indicate positive acts of States against an exception to Head of State immunity. Another curious point of the Court in its decision is that merely three paragraphs later, the ICJ lays down four exceptions to a Head of State's and by analogy, a Foreign Minister's claim of immunity: a) prosecution within the one's own State; b) a waiver of the immunity by the State which they represent; c) the official's seizure from office; and d) prosecution of the incumbent Head of State before an international tribunal.

The ICJ presents a four-pronged system of exceptions to absolute immunity, and states that this system sufficiently ensures that immunity does not equal to impunity.[131] Judges Higgins, Kooijmans and Buergenthal in

130. Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), at 21, ¶ 58 (emphasis supplied).

131. Altman, *supra* note 94, at 11.

their joint separate opinion, however, feel that the realities of the system are "less than sanguine."[132]

On the first exception laid down by the Court, it is highly unlikely that a high State official, much less a Head of State, would ever be brought to criminal courts before his own country.[133] Second, it is highly unlikely that the country would waive immunity for its own representative traveling abroad as long as there has been no change in power.[134] These two exceptions hinge highly on the willingness of the national government to prosecute; however, when the national authorities are not willing to prosecute, the crime goes unpunished.[135] Third, the requisite of loss of office before prosecution provides little clarity. As found by Judges Higgins, Kooijmans and Buerganthal, this does not address the problem posed by belligerent governments that might keep an official in office exclusively to avoid prosecution.[136] Additionally, in many totalitarian governments, leaders declare themselves as "Heads of State for life."[137] Requiring a vacation from office by an incumbent Head of State before prosecution may ensue, however, would mean that "Heads of State for life" will never be held responsible for their actions. This is highlighted by the fact that States would do everything within their power to avoid State responsibility for their

132. Arrest Warrant of 11 April 2000, General List No. 121 (2002), Joint Separate Opinion Higgins, Kooijmans, Buergenthal, at ¶ 78.

133. Altman, *supra* note 94, at 11.

134. Arrest Warrant of 11 April 2000, General List No. 121 (2002), Joint Separate Opinion Higgins, Kooijmans, Buergenthal, at ¶ 78.

135. *Id.* Dissenting Opinion Van Der Wyngaert, at ¶ 35.

136. *Id.* Joint Separate Opinion Higgins, Kooijmans, Buergenthal, at ¶ 78.

137. Several individuals have held the position as Heads of State for considerable lengths of time. Igor Nikolayevich Smirnov has been President of the Transdniestrian Moldovan Republic since Dec. 1, 1991. Muhammad Hosni Said Mubarak has been the leader of Egypt since Oct. 6, 1981. Pervez Musharraf has been President of Pakistan since Oct. 12, 1999. Robert Mugabe has headed the government of Zimbabwe since 1980. Nursultan Abishuly Nazarbayer has ruled Kazakhstan since 1990. Muammar Abu Minyar al-Qaddafi has been leader of Libya since 1969. Saparmurat Atayevich Niyazov Turkmenbashy has been the most influential figure in Turkmenistan since 1985. Kim Jong-il has been the ruler of North Korea since 1994.

Also, many individuals remained Heads of State of their respective countries until their deaths. Among many others, Fidel Castro remained President of Cuba from 1976 until his death on October 2004; Kim Il-Sung became the ruler of North Korea from 1948 until his death on 1994; and Mobotu Sese Seko Nkuku wa za Banga stayed as Head of State of Zimbabwe from 1965 until his death on 1997.

acts.[138] Moreover, the core crimes (that is, genocide, crimes against humanity and war crimes) can only be committed with the mechanisms of the State,[139] thus, removing the efficacy of entitling such individuals to immunity. Fourth, the prosecution under the ICC or other international criminal tribunals is subject to many loopholes. Since the ICC does not have the power to arrest individuals, its must therefore rely on the willingness or ability of States to bring perpetrators of crimes before their jurisdiction.[140]

These exceptions laid down by the Court merely suggest a doctrinal proposition which is neither based on international law nor does it address the substantive or pragmatic issue of impunity afforded to Heads of State. As Judge Van Der Wyngaert expressed in his dissenting opinion in *Arrest Warrant*, "[i]n practice ... immunity leads to *de facto* impunity. All four cases mentioned by the Court are highly hypothetical."[141]

B. Evidence of Other Exceptions to Head of State Immunity

In stating that there existed no exception to immunity granted to Heads of State, the ICJ failed to detect several trying exceptions to jurisdiction under international law. One such exception is found in the *Qhaddafi* case,[142] where although the French *Cour de Cassation* allowed Qhaddafi's claim of immunity, it is undeniable that by stating that "terrorism is not one of the exceptions," it may be inferred that other exceptions to immunity do exist.

Other exceptions are also found in municipal law of other States, particularly in the United States. In the case of *Noriega*, [143] General Manuel Noriega of Panama, upon his surrender to the United States, was indicted for having allegedly participated in an international conspiracy to import

138. Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?*, 13 EURO. J. INT'L. L. 895, 899 (2002).

139. *See,* Arrest Warrant of 11 April 2000, General List No. 121 (2002), Dissenting Opinion Van Der Wyngaert, at ¶ 36 (Crimes against humanity, genocide and war crimes are so complex that it becomes difficult to commit them without the use of the government machinery. In fact, all cases involving core crimes have indicted governmental officials.).

140. Rome Statute of the ICC, art. 59 (providing that custodial States must take steps to arrest an individual subject to a request for provisional arrest or arrest by the ICC).

141. Arrest Warrant of 11 April 2000, General List No. 121 (2002), Dissenting Opinion Van Der Wyngaert, at 18, ¶ 34.

142. *Arrêt* of the *Court de Cassation*, Mar. 13, 2001, No. 1414.

143. U.S. v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).

cocaine into and out of the United States.[144] Noreiga contended that the US Courts did not have jurisdiction and that sovereign immunity precluded the exercise of jurisdiction. However, the Circuit Court of Florida opined that since Noriega was neither a *de jure* nor even *de facto* Head of State of Panama, the privilege of immunity could be freely withheld by the United States.[145]

Moreover, the United States Court in *Doe v. Karadzic* and *Kadic v. Karadzic,*[146] cases involving civil suits against self-proclaimed and unrecognized President of Republika Serbksa, Radovan Karadzic, for genocide and crimes against humanity committed during the conflict in Bosnia-Herzegovina, denied immunity to Karadzic because the United States did not recognize the Bosnian-Serb nation and consequentially, did not recognize Karadzic as Head of State. In its decision, the Court held, "[w]ere the Executive Branch to declare defendant a head-of-state, this court would be stripped of jurisdiction."[147]

The *Karadzic* decision based its authority from the *Lafontant v. Aristide*[148] case where Lafontant sought monetary compensation against sitting Head of State President Jean-Bertrand of Haiti for the murder of her husband by the Haitian military under the direct order of Aristide.[149] In granting immunity to Aristide, the Court held that "a visiting Head of State is generally immune from the jurisdiction of a foreign State."[150]

In all these US cases, the immunity afforded for recognition is only absolute for civil cases, but is merely a privilege when it concerns criminal responsibility.[151] This, however, would be consistent with the fact that Head of State immunity is nothing more than an extension of comity by the forum State to other States. Verily, the US position strengthens the notion that immunity is merely an exception to the principle of adjudicatory jurisdiction.

In conclusion, the existence of multiple exceptions to the rule of Head of State immunity, assuming its customary character, negates the ICJ's claim in *Arrest Warrant* that immunities of incumbent Heads of State are absolute. This, coupled with the fundamental premise that Head of State immunity

144. *Id.* at 1510; *John Goshko, Bush Confronts Dilemma Over Panama: President Must Choose Between Actions Taken Likely to Fail or Endanger U.S. Interests*, WASH. POST, May 10, 1989, at A23.

145. U.S. v. Noriega, 117 F.3d 1206 (11th Circ. 1997), at 1212.

146. Doe v. Karadzic and Kadic v. Karadzic 844 F. Supp. 734 (U.S. S.D. NY 1994).

147. *Id.*

148. Lafontant v. Aristide, 844 F. Supp. 128 (US E.D. NY 1994).

149. Altman, *supra* note 94, at 6.

150. Lafontant v Aristide, 844 F. Supp. 128 (US E.D. NY 1994).

151. U.S. v. Noriega, 117 F.3d 1206 (11th Circ. 1997), at 1212.

merely arises out of comity of the forum State, necessitates a more prudent approach in tackling the strictures of Head of State immunity by using vigilant discernment in distinguishing between immune and non-immune conduct of the Head of State.

IX. SPECIFIC CIRCUMSTANCES IMPOSING AN ABSOLUTE SHIELD TO PROSECUTION

As previously established, the immunities granted to Heads of State do not arise from any principle under customary international law, but rather is an exception to the principle of adjudicatory jurisdiction.[152] The respect afforded to the forum State for defining their rules on immunity, however, only extends insofar as civil liability for the commission of core crimes are concerned. On the other hand, customary international law mandating criminal responsibility for the commission of core crimes necessitates a non-conferment of Head of State immunity in areas of criminal responsibility. This, however, is merely the general rule and subject to a specific exception, particularly embodied in article 21 of the Convention on Special Missions:

> 1. The Head of a sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State, facilities, privileges and immunities accorded by international law to Heads of State on official visit.
>
> 2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.[153]

The Convention on Special Missions explicitly provides that when a Head of State leads a special mission, he shall be entitled to immunity granted by international law. This provides for both the functional and personal immunity of the Head of State. Without doubt, there is logic to this claim due to the fact that in situations where the Head of State leads a special mission, he possesses the status of a diplomat and thus the rationale for the Head of State's entitlement to immunity would be the same rationale for entitling diplomats to functional and personal immunity arising from the Vienna Convention of Diplomatic Relations, particularly, to maintain amicable relationships between States.[154]

152. Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 113, 215 (1980, II).

153. Convention on Special Missions, art. 21.

154. *Arrêt* of the *Court de Cassation*, Mar. 13, 2001, No. 1414, at 4 (where the *Advocat general* suggested, "the principle of immunity for Heads of State is an extension of international respect and courtesy and is necessary to maintain amicable relationships between States") (original on file with author).

X. RECOMMENDATIONS

The effects of the ICJ's decision in *Arrest Warrant* can be regarded as nothing short of a dangerous precedent pregnant with considerable potential for abuse in the international arena considering that the Court, in effect, sanctioned Heads of State, using their positions of power, with absolute shields against any form of judicial process.[155] In chief, therefore, the ICJ, through an unconvincing, unresearched and inconsistent ruling, gave the Head of State an avenue for absolute impunity for his or her acts. The ruling, however, cannot be binding in international law since this goes against the very foundations on which the law is based — justice.

There can be no doubt that the grant of absolute immunity to a Head of State will result in absolute impunity for his or her criminal conduct. A necessary consequence, therefore, would be an impossibility of seeking redress for justice on the part of the victim. In order to rectify this dilemma, it is then necessary to change the perspectives of the international legal community on the concept of Head of State immunity as well as lay down specific guidelines for the determination of immune and non-immune conduct to ensure that the same will not be subject to arbitrariness or abuse.

A. From Custom to Comity: A Paradigm Shift on Applying Head of State Immunity

The ICJ in *Arrest Warrant* proceeded from the premise that Head of State immunity was a right derived from customary international law. This is not surprising considering that even Belgium readily conceded this preliminarily in their Counter-Memorial to the Democratic Republic of Congo.[156] This same premise became the foundation for the Court's findings in *Mugabe*,[157] *Al-Adsani*,[158] *Zemin*,[159] and *Sharon*.[160] In addition, the ICJ's introduction of four exceptions to Head of State immunity is also telling of the fact that the Court nevertheless contemplated that Head of State immunity is, in fact, not to be absolute. This, therefore, may lead one to conclude that the burden of demonstrating that the conduct of the Head of State falls outside his or her blanket immunity rests on the shoulders of the plaintiff. This postulate, however, should be re-examined since the findings of the courts would

155. Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), at 19, ¶ 53-54.

156. Counter Memorial of the Kingdom of Belgium, *supra* note 80, at ¶ 3.5.1.

157. Tachiona v. Mugabe, 746 F. Supp. 1506 (S.D. Fla. 1990).

158. Al-Adsani v. The United Kingdom, Case No. 35763/97 [2001] E.C.H.R. 752.

159. Plaintiffs A, B, C, D, E, F v. Zemin, No. Civ. 02-75030, 2003 WL 22118924 (N.D. Ill., Sep. 12, 2003).

160. Hijazi, *et. al.* v. Sharon, Belgian *Cour de Cassation*, Case No. P.02.1139.F/1, Feb. 12, 2003.

unquestionably be altered if the presumption would be for the non-applicability of immunity for the commission of core crimes rather than on obligation to prove an exception to immunity.

In addition, the accession of subsequent cases to *Arrest Warrant*'s erroneous premise on the customary nature of Head of State immunity cannot readily be considered as *opinio juris* or State practice on the matter. Had it not been for the erroneous notion of the Court, the present rules of international law would clearly demonstrate a non-validation of Head of State immunity's customary nature. Otherwise, this ruling would be a cataclysmic event which may even be considered to be the start of instant custom. Nonetheless, instant custom is merely an acceleration of the custom-forming process.[161] Therefore, the entrenched principles of the irrelevance of official status provision and the widespread acceptance of the same would inhibit this custom-forming process. And finally, although judicial decisions may form an essential basis of the rules of international law,[162] these rules are still inconclusive on the formation of custom.

Verily, due to non-fundamental and non-customary character of Head of State immunity, the initial premise of international tribunals on Head of State immunity must fail. In fact, it would seem that the more probable basis for Head of State immunity is nothing more than a mere respect for or recognition of sovereignty which the Head of State represents — comity.

In conclusion, the non-fundamental and non-customary character of Head of State immunity cannot justify any presumption of immunity given by both international and domestic courts to incumbent Heads of State. Rather, the fundamental premise should be that absent any domestic legislation conferring Head of State immunity for purposes of functional necessity, the Head of State cannot use immunity as a procedural bar from prosecution or civil suit. It logically follows, then, that Head of State immunity is nothing more than a mere privilege granted upon Heads of State, rather than a demandable right.[163] And as a privilege, the conferment of immunity must be subject to the general will of the forum State and must comply with custom mandating justice for the victim through criminal culpability. This paradigm shift will ultimately lead to a new string of judicial decision-making and quintessentially, open the door to possible redress for the victims of the criminal atrocities of the Head of State.

161. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L. L. 413, 435 (1983); Banjamin Langille, *It's "Instant Custom:" How the Bush Doctrine became Law After the Terrorist Attacks of Sept. 11, 2001*, 26 BOS. COL. INT'L & COMP. L. R. 145, 151 (2003).

162. Statute of the International Court of Justice, art. 38.

163. *See*, U.S. v. Noriega, 117 F.3d 1206, 1212 (11th Circ. 1997); *In Re* Grand Jury Proceedings, Doe, 817 F.2d 1108, 1110-11 (4th Cir. 1978).

B. Defining Areas of Inviolability and Areas of Culpability

The shift from customary Head of State immunity to comity-based immunity is only a preliminary, although integral, part of attaining justice for the victims of criminal atrocities. On a second level, it becomes necessary to determine which conduct may be subject to immunity through a grant of comity. Thus, five scenarios will be laid and the query on whether such conduct may be subject to immunity shall be determined.

1. Ordinary Civil Suits — May Be Subject to Immunity

Ordinary civil suits involve civil proceedings against the Head of State for simple matters such as violations of contract, or even tort liability. Within the realm of this area, the forum State has the absolute power whether or not it wishes the same to fall under an exception to its adjudicatory jurisdiction. Although there would seem to be a conflict between the interest of the individual making the claim and the extension of comity conferred by the forum State, any prohibition on the forum State imparting Head of State immunity may undermine the over-all interest of the forum State's diplomatic policy. It must be noted that ordinary civil suits may be numerous and are subject to minimal government regulation. Thus, if the Head of State is not conferred immunity or if the forum State is prohibited from bequeathing such grant, the functions of the foreign Head of State may be unnecessarily hampered by resilient harassers. Therefore, under this scenario, the forum State must have the capacity to grant immunity on the Head of State.

2. Criminal Prosecution for Ordinary and Heinous Acts — May be Subject to Immunity

The commission of criminal acts necessitates an avenue on the part of the victim to seek redress. However, the determination on the imposition of Head of State immunity when the foreign Head of State commits an ordinary or even heinous criminal act must still be considered the prerogative of the forum State. Although criminal prosecution is much more regulated than civil suits, the initiation of criminal proceedings against a Head of State would not only unduly hamper the effective performance of the functions of the Head of State, but would also undermine the respect and recognition given unto the sovereignty which he or she represents. By instituting criminal proceedings against the Head of State, it would be a direct blow upon the sovereign dignity of the Head of State, as well as unduly impede diplomacy and inter-State relations. As such, under this scenario the forum State also has the absolute right to impose the procedural bar of immunity on the conduct of the foreign Head of State.

3. Civil Suits for the Commission of Core Crimes — May be the Subject to Immunity

The commission of core crimes has long been considered as violations of *jus cogens* norms prohibiting the commission of the crime of genocide, crimes against humanity and war crimes.[164] State practice, however, as found in *Mugabe*,[165] *Al-Adsani*,[166] *Zemin*,[167] and *Sharon*,[168] would indicate that even in the commission of acts contrary to *jus cogens* prohibitions, forum States may still create legislation which immunizes Heads of State from civil suits involving the commission of core crimes. Although it would seem that this would violate the balancing of interests between justice for the victim and the need for comity, recognition and respect to a foreign State, an inherent fixture differentiates criminal proceedings for the commission of core crimes and civil ones. On the former, as the same is subject to rigorous governmental regulation coupled with a higher degree of proof, initiation of proceedings merely to harass the Head of State is limited. On the other hand, the institution of civil proceedings is largely left to the discretion of parties and the burden of proof requirement is much lower. In addition, if the Court rules against the Head of State, the obligation to pay would burden the Government, and consequently the people, which he or she represents due to his or her representation as a Head of the State. This would be unduly burdensome to the people of the Head of State who will be required to compensate the victims for a core crime which is purely private in nature.

4. Criminal Prosecution for the Commission of Core Crimes — Never Subject to Immunity

When it comes to criminal prosecution for the commission of core crimes, the rule is very simple. Even if the forum State has the power to grant immunity to Heads of State pursuant to comity, this power does not extend to the conferment of immunity for the commission of core crimes. At the onset, it must be noted that a clash between the adjudicatory jurisdiction of the forum State and the customary norm obligating the criminal culpability of the offender exists. To resolve this clash, therefore, the hierarchy of norms must be considered.

164. Pinochet III, *supra* note 35, Lord Wilkinson-Browne; Prosecutor v. Kupreskic, [ICTY Appeals Chamber], Case No. IT-95-16-A, Oct. 23, 2001; Restatement (Third) of the Foreign Relations Law of the United States.

165. Tachiona v. Mugabe, 746 F. Supp. 1506 (S.D. Fla. 1990).

166. Al-Adsani v. The United Kingdom, Case No. 35763/97 [2001] E.C.H.R. 752.

167. Plaintiffs A, B, C, D, E, F v. Zemin, No. Civ. 02-75030, 2003 WL 22118924 (N.D. Ill., Sep. 12, 2003).

168. Hijazi, *et. al.* v. Sharon, Belgian *Cour de Cassation*, Case No. P.02.1139.F/1, Feb. 12, 2003.

Considering, however, that only the right of comity and the obligation of custom clash, the normative hierarchical approach is not applicable. Unlike the scenario where custom must give way to *jus cogens* due to its non-derogable nature,[169] the clash between custom and comity does not necessitate such a hard-and-fast rule. But considering the balancing of interests, the role of comity in granting Head of State immunity must give way to the customary rule requiring culpability.

Under the balancing of interests test, the benefit derived from comity in granting Head of State immunity must be measured with the State's interest in complying with its international obligations requiring culpability in the case of core crimes and also, the interest of justice for the victim. Concededly, the State's interest in fostering international peaceful relations and economic prosperity through trade with the sovereign of the Head of State may be accorded through a grant of immunity. However, the call for justice as well as the obligations mandated by customary international law appeal for the imposition of responsibility for the commission of core crimes. Moreover, the capacity of States to give respect and recognition to other States pursuant to sovereign equality should not, and cannot, override the need for justice of the victim of core crimes.

It bears stressing that the commission of core crimes is not merely a simple crime, but one of such gravity and magnitude that international law considers its prohibition to be a *jus cogens* norm. This would, therefore, show that in the situation where a Head of State is prosecuted for the commission of core crimes, he or she cannot escape criminal responsibility by simply claiming the procedural bar of immunity. Additionally, it cannot be claimed that the customary rules requiring culpability only involve substantive matters and not procedural ones,[170] such as immunity, since the procedural bar would eventually lead to *de facto* impunity.[171]

Therefore, when a Head of State is criminally prosecuted for the commission of international core crimes before domestic courts, the forum State does not have the authority to grant any form of immunity to the Head of State. Any such grant violates the rules of international law and must be considered to be void.

169. Reimann, *supra* note 75, at 421-23; Bianchi, *supra* note 27, at 265; Orakhelashvili, *State Immunity in National and International Law*, *supra* note 75, at 712-13; Caplan, *supra* note 1, at 743; Akande, *supra* note 58, at 414.

170. Report of the International Law Commission on the Work of its Forty-Eighth Session, May 6, 1996, UN Doc. A/51/10, at 59.

171. *See*, Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), Dissenting Opinion Van Der Wyngaert, at 18, ¶ 34.

5. Any Suit Where the Head of State is on an Official Visit — Always Subject to Immunity

A different scenario, altogether, arises when a foreign Head of State is in the territory of the forum State due to an official visit. Here, consistent with the ruling of the Spanish *Audencia Nacional* in *Castro*,[172] all States must abide by international law giving absolute immunity *ratione personae* and immunity *ratione materiae* to Heads of State engaged in official missions.[173] Allowing certain variance in the rule would open the floodgates to a myriad of abuses such as inviting a Head of State for an official visit and upon his or her arrival, arresting him or her for an alleged commission of core crimes. Such situation would unduly hamper international relations by discouraging wary Heads of State from traveling to other nations and thus possibly lessening international trade.

In conclusion, as a general rule, foreign States have the capacity to grant Head of State immunity by virtue of comity. This arises whether the immunity is conferred for ordinary civil suits, criminal prosecution or civil proceedings for the commission of core crimes. However, pursuant to their obligations under customary international law mandating criminal culpability, forum States do not have the power to grant Heads of State immunity from criminal prosecution for the commission of core crimes. These rules, however, are not absolute. In case the Head of State leads an official mission, the Head of State's immunity must be absolute, whether or not the forum State grants this privilege through comity.

C. Probable Cause: A Condition Precedent for Admissibility

Despite the delineation of conduct which may be subject to immunity and suability, procedural standards must still be imposed in order to curtail possible arbitrariness and abuse. It must be emphasized that criminal proceedings may unduly interfere with the effective performance of the duties of a Head of State. Thus, it would be sufficient if the requirement of probable cause first be established as a condition precedent before the initiation of criminal prosecution against Heads of State.

Probable cause has been defined as "a well-founded belief on the guilt of the accused or that there is at least some valid reason on which to base a belief in criminality."[174] Verily, probable cause has not been a novel concept in the sphere of international criminal law as numerous tribunals require a finding grounded on reasonable belief on the commission of criminal acts

172. Order (*auto*) of 4 March 1999 (no. 1999/2723).

173. Convention on Special Missions, art. 21.

174. 22 C.J.S. 521, § 356.

before the initiation of criminal proceedings.[175] Thus, since the determination of probable cause is necessary before the initiation of criminal proceedings before most jurisdictions, the same may be a reasonable condition before the initiation of prosecution, particularly at the preliminary investigation stage, against a Head of State.

D. Shifting the Burden Unto the Head of State

Under the qualified absolute immunity doctrine established by *Arrest Warrant*, the claimant against the Head of State has the obligation to prove that the circumstances call for an exception to immunity.[176] On the other hand, the restrictive immunity doctrine, as claimed by Belgium in *Arrest Warrant*,[177] still places the burden on the claimant to prove that the conduct of the Head of State falls under an exception to Head of State immunity. However, as Head of State immunity is merely based on comity, immunity is nothing more than an exception to the adjudicatory jurisdiction of States. Thus, in order to claim immunity, the burden must not be on the claimant, but rather, on the shoulders of the Head of State.

A complete transfer of the burden, without possible defenses on the part of the Head of State, however, would fail in the balancing of interests test considering their special status. Therefore, once probable cause has been established, remedies must be available to the Head of State in order to rebut the allegations. This compromise will allow an avenue for the victim of the core crime to seek justice and at the same time, allow States to respect, to a certain degree, the dignity of Heads of State.

E. The Draft Articles on Jurisdictional Immunities of Heads of State

The abovementioned principles are consistent with the rules provided by international law. However, the present void of State practice on Head of State immunity for the commission of core crimes necessitates that certain

175. *See*, Rome Statute of the ICC, art. 53; ICTY Statute, art. 18; ICTR Statute, art. 17; Nuremburg Charter, art. 16 (c).

176. The circumstances falling under the exception to immunity are: 1) when the Head of State is prosecuted in his or her own country; 2) when the Head of State's country waives his immunity; 3) when the Head of State loses his or her position; and 4) when the Head of State is prosecution under international criminal tribunals. *See,* Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121 (2002), at 22, ¶ 61.

177. Belgium contended that generally, the customary rules on Head of State immunity prohibit the initiation of proceedings against Heads of State. They claimed, however, that the commission of crimes against humanity and war crimes were conduct falling under an exception to the general immunity doctrine. *See*, Counter Memorial of the Kingdom of Belgium, *supra* note 80, at ¶ 3.5.1.

express guidelines be created. To take these principles into effect, the following model law is recommended:

DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF HEADS OF STATE

Whereas forum States have the right to impose exceptions to their general jurisdiction;

Whereas the commission of core crimes such as the crime of genocide, crimes against humanity and war crimes are considered as violations of *jus cogens* norms from which no derogation is permitted;

Whereas the rule imposing culpability for the commission of core crimes has achieved the status of customary international law;

Whereas individuals have used immunity as a procedural bar to commit acts with impunity;

The States parties to this Agreement have agreed as follows:

Article 1 Definition of Terms:

a.) Head of State — An individual representing the sovereignty of a State;

b.) Core Crimes — The crimes of genocide, crimes against humanity and war crimes;

c.) Genocide — This Agreement adopts the definition of genocide as defined in Article 6 of the Rome Statute of the International Criminal Court;

d.) Crimes Against Humanity — This Agreement adopts the definition of crimes against humanity as defined in Article 7 of the Rome Statute of the International Criminal Court;

e.) War Crimes — This Agreement adopts the definition of war crimes as defined in Article 8 of the Rome Statute of the International Criminal Court and the grave breaches of the 1949 Geneva Conventions and its Additional Protocols;

f.) Forum State — The State where the judicial proceedings against a Head of State are instituted.

Article 2 The forum State shall have the capacity to grant immunities to Heads of State for permissible conduct within their jurisdiction. The grant of immunity may be functional or personal.

Article 3 Functional immunities granted to Heads of State prohibit the institution of civil and criminal proceedings against Heads of State when the act complained of is within the official functions of the Head of State.

Article 4 Personal immunities granted to Heads of State prohibit the initiation of civil or criminal proceedings against Heads of State while they are in office, regardless of the relation of their acts with their official functions.

Article 5 No forum State shall have the power to grant either personal or functional immunity to a Head of State in criminal proceedings for the commission of core crimes. This prohibition does not prejudice the right of forum States to grant immunities for civil proceedings.

Article 6 Before initiation of proceedings against a Head of State, evidence must first be obtained and such evidence must provide a reasonable basis to believe that a crime has been or is being committed and that the Head of State has participated or is participating in its commission.

Article 7 No forum State may initiate any proceeding, civil or criminal, regardless of gravity, against a foreign Head of State who travels in a Special or Official Mission.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement, open for signature at _____ on _____.

XI. CONCLUSION

The changing dimensions of incumbent Head of State immunity have made many authors and courts conclude that the Head of State immunity has already crystallized into customary international law. This claim, however, is premature and the evolution of the standards of Head of State immunity has not yet received sufficient recognition in State practice and *opinio juris*. On the other hand, the historical basis for the conferral of Head of State immunity — courtesy and comity — is still the rationale for the imposition of such immunity. In fact, the extent of immunity covered under Head of State immunity is founded on the same basis for the grant of immunity to other sovereign States. Immunity then, despite its longstanding presence in international law, is not a rule but rather, an exception to the adjudicatory jurisdiction of States. As such, the claim of absolute immunity to Heads of State is nothing but abstract concept not based on any principle of international law.

Nonetheless, the balancing of interests of States between comity and the customary international law calling for criminal responsibility for the most serious criminal offenses — core crimes — mandates that the cloak of Head of State immunity be removed as a procedural bar for criminal culpability.

Moreover, on the remote possibility that Head of State immunity is based on customary norms, international law still mandates a non-conferment of immunity. This necessity is solved on both forms of immunities. Functional immunity cannot be granted on the basis of functional necessity since such conduct cannot be considered to fall within the realm of official acts. On the other hand, the personal immunity of Heads of State clash with customary rules on criminal responsibility for core crimes. The only feasible solution would be to allow an exception to the

rule of immunity to pave the way for culpability for the commission of grave criminal atrocities.

This rule, however, is not absolute. State practice has long adhered to the allowance of the procedural shield of immunity in case of civil liability. Additionally, it is unprecedented to subject Heads of State in official visits to criminal processes. Allowing otherwise would cause great chaos in the international sphere and seriously hamper inter-State relations. Based on the balancing of interests, since international law was created to foster interstate relations, the immunity granted to Heads of State on official missions must be absolute.